Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HARRY BENION and PATRICIA BENION,

Petitioners,

v.

BANK ONE, DAYTON, N.A.; ECHO ACCEPTANCE CORPORATION; and SUPERIOR SATELLITE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the Seventh Circuit repudiate the language and purpose of the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"), and its implementing regulations, by refusing to apply the "reasonableness" test that the Federal Reserve Board mandated for determining whether a credit transaction should be documented as open-end or closed-end?

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PREVIOUS OPINIONS

The citations of the official reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Northern District of Illinois: *Benion v. Bank One, N.A.*, 144 F.3d 1056 (7th Cir. 1998). App. 1.

The United States District Court for the Northern District of Illinois granted plaintiffs' motion for relief from judgment pursuant to Fed. R.Civ.P. 60(b) and dismissed Count III of plaintiff's complaint for lack of federal jurisdiction as to defendant Superior Satellite, Inc. Unreported (July 10, 1997).

The United States District Court for the Northern District of Illinois granted defendants' motions for summary judgment and denied plaintiffs' motion for summary judgment. *Benion v. Bank One, N.A.*, 967 F.Supp. 1031 (N.D.Ill. 1997). App. 10.

The United States District Court for the Northern District of Illinois granted plaintiffs' motion for class certification. Unreported (May 7, 1996).

STATEMENT OF JURISDICTION

The Seventh Circuit affirmed the decision of the District Court for the Northern District of Illinois granting summary judgment in favor of all defendants on May 21, 1998. App. 1. The petitioners now timely seek a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"):

15 U.S.C. §1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title.

. . .

(i) The term "open end credit plan" means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open end credit plan even if credit information is verified from time to time.

. . .

15 U.S.C. §1637. Open end consumer credit plans

(a) Required disclosures by creditor. Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period (if any) within which any credit extended may be repaid without incurring a finance charge, except that the creditor may, at his election and without disclosure, impose no such fi-

nance charge if payment is received after the termination of such time period. If no such time period is provided, the creditor shall disclose such fact.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) Identification of other charges which may be imposed as part of the plan, and their method of computation, in accordance with regulations of the Board.

(6) In cases where the credit is or will be secured, a statement that a security interest has been or will be taken in (A) the property purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type.

(7) A statement, in a form prescribed by regulations of the Board of the protection provided by sections 161 and 170 [15 USCS §§ 1666 and 1666i] to an obligor and the creditor's responsibilities under sections 162 and 170 [15 USCS §§ 1666a

and 1666i]. With respect to one billing cycle per calendar year, at intervals of not less than six months or more than eighteen months, the creditor shall transmit such statement to each obligor to whom the creditor is required to transmit a statement pursuant to section 127(b) [subsec. (b) of this section] for such billing cycle.

. . .

15 U.S.C. §1638. Transactions other than under an open end credit plan

(a) Required disclosures by creditor. For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

(1) The identity of the creditor required to make disclosure.

(2) (A) The "amount financed," using that term, which shall be the amount of credit of which the consumer has actual use. This amount shall be computed as follows, but the computations need not be disclosed and shall not be disclosed with the disclosures conspicuously segregated in accordance with subsection (b)(1):

(i) take the principal amount of the loan or the cash price less downpayment and trade-in;

(ii) add any charges which are not part of the finance charge or of the principal amount of the loan and which are financed by

the consumer, including the cost of any items excluded from the finance charge pursuant to section 106 [15 USCS § 1605]; and

(iii) subtract any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit.

(B) In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed. The statement shall include spaces for a "yes" and "no" indication to be initialed by the consumer to indicate whether the consumer wants a written itemization of the amount financed. Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable:

(i) the amount that is or will be paid directly to the consumer;

(ii) the amount that is or will be credited to the consumer's account to discharge obligations owed to the creditor;

(iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person; and

(iv) the total amount of any charges described in the preceding subparagraph (A)(iii).

(3) The "finance charge," not itemized, using that term.

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $75 and the finance charge does not exceed $5, or if the amount financed exceeds $75 and the finance charge does not exceed $7.50.

(5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments."

(6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

(7) In a sale of property or services in which the seller is the creditor required to disclose pursuant to section 121(b) [15 USCS § 1631(b)], the "total sale price," using that term, which shall be the total of the cash price of the property or services, additional charges, and the finance charge.

(8) Descriptive explanations of the terms "amount financed," "finance charge,"

"annual percentage rate," "total of payments," and "total sale price" as specified by the Board. The descriptive explanation of "total sale price" shall include reference to the amount of the downpayment.

(9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type.

(10) Any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment, other than a deferral or extension charge.

(11) A statement indicating whether or not the consumer is entitled to a rebate of any finance charge upon refinancing or prepayment in full pursuant to acceleration or otherwise, if the obligation involves a precomputed finance charge. A statement indicating whether or not a penalty will be imposed in those same circumstances if the obligation involves a finance charge computed from time to time by application of a rate to the unpaid principal balance.

(12) A statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity

of the debt, and prepayment rebates and penalties.

. . .

12 C.F.R. §226.2. Definitions and rules of construction

(a) Definitions. For purposes of this regulation, the following definitions apply:

. . .

(20) Open-end credit means consumer credit extended by a creditor under a plan in which:

(i) The creditor reasonably contemplates repeated transactions;

(ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and

(iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

. . .

Federal Reserve Board Official Staff Commentary on Regulation Z, Comments to §226.2(a)(20)

. . .

3. Repeated transactions. Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit

> plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time extension of credit . . . . For example:
>
> - It would be more reasonable for a thrift institution chartered for the benefit of its members to contemplate repeated transactions with a member than for a seller of aluminum siding to make the same assumption about its customers.
> - It would be more reasonable for a bank to make advances from a line of credit for the purchase of an automobile than for an automobile dealer to sell a car under an open-end plan.
>
> . . .
>
> The determination of whether a creditor can reasonably contemplate repeated transactions requires objective analysis. Information that much of the creditor's customer base with accounts under the plan make repeated transactions is relevant to the determination, particularly when the plan is opened primarily for the financing of infrequently purchased products or services.

STATEMENT OF THE CASE

Harry Benion and Patricia Benion purchased a satellite dish and related components from Superior Satellite, Inc. ("Superior") on February 17, 1995. The Benions wanted to finance this large expenditure, which cost $4,297.52, and Superior directed them to Echo Acceptance Corporation ("Echo")'s financing plan. Echo

issued the Benions an "Echostar Revolving Charge Plan," which was an open-end charge account that could only be used at satellite antenna dealers affiliated with Echo. Bank One, Dayton, N.A. ("Bank One") was the creditor on the account, and it supplied the Benions with a "credit limit" of $4,500.

Because the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"), does not require creditors in open-end credit transactions to disclose the total amount of finance charges or the total number of payments required to pay off the debt, the Benions never knew how much money they would actually have to pay for the satellite dish or how many payments they would be required to make in order to pay the debt in full. In fact, the Benions' expert estimated that if the Benions had made only the minimum payment each month, the satellite dish would have taken *over fifty years to pay off*, at a total cost of over $40,000.

Superior attempted to install the dish a few days later. It used defective connectors and wiring, damaged the Benions' home while drilling, failed to properly ground the system, and appropriated the wiring that belonged to the Benions' cable provider. As a result, the cable company disconnected the Benions' cable service, the improper installation damaged the television set to which the dish was connected, and the dish itself failed to operate properly.

The defendants refused to make the Benions whole, and on July 19, 1995, the Benions brought this lawsuit to seek redress for defendants' improper use of "open-end" credit agreements to finance satellite television systems. The Benions contended that the defendants

systematically wronged consumers by using open-end credit disclosures to conceal the true costs of the credit for one-time purchases.

On November 15, 1996, the Benions filed a motion for partial summary judgment on the issue of liability against Bank One. All three defendants then filed cross-motions for summary judgment. On June 11, 1997, the United States District Court for the Northern District of Illinois denied the Benions' motion for partial summary judgment and granted judgment in favor of the defendants. The District Court, Ruben Castillo, Judge, noted that it reached this result "reluctantly" because "the use of the charge card credit plan at issue here *undeniably tends to undermine [the consumers'] ability to appreciate fully the cost of their credit obligations*, to the detriment of Congress' goal in enacting TILA—enabling consumers to shop for and use credit wisely." App. 11 (emphasis added).

The Benions timely appealed to the United States Court of Appeals for the Seventh Circuit. On May 21, 1998, the Seventh Circuit affirmed the decision of the District Court, holding that defendants did not violate TILA's disclosure requirements by providing only open-end disclosure in conjunction with the sale of the satellite dish. App. 9. The Benions believe that the Seventh Circuit ignored clear Congressional directives and contravened the language and intent of TILA to the great disadvantage of millions of consumers. Because the Seventh Circuit's opinion will deprive the public of critical disclosures necessary for the informed use of credit, the Benions respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

I. THE SEVENTH CIRCUIT REPUDIATED THE LANGUAGE AND PURPOSE OF TILA AND ITS IMPLEMENTING REGULATIONS BY REFUSING TO APPLY A "REASONABLENESS" TEST FOR DETERMINING WHETHER A CREDIT TRANSACTION SHOULD BE DOCUMENTED AS OPEN-END OR CLOSED-END.

The Seventh Circuit is the first court of appeals to consider whether a particular transaction is, in fact, a closed-end transaction that was documented as an open-end transaction solely to avoid the stricter disclosure requirements that accompany closed-end credit. From its inception, the Truth in Lending Act has prohibited the use of spurious open-end credit.

In a decision that strikes a severe blow against the protection that TILA's closed-end credit disclosure requirements were designed to provide to consumers, the Seventh Circuit ignored the test that Congress and the implementing Federal Reserve Board ("FRB") regulations and commentary require. The Seventh Circuit abdicated its duty to apply the statute and its implementing regulations as written, ironically justifying its refusal by purporting to defer to the FRB by demanding that the FRB revise its regulations.

As shown below, the Seventh Circuit has improperly *rejected* Congress' and the FRB's explicit instructions by refusing to apply the "reasonableness" analysis mandated by TILA and its implementing regulations. As such, the Seventh Circuit's opinion is directly contrary to this Court's decision in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980) (because of the "complexity and variety" of credit terms, "Congress therefore delegated expansive authority to the Federal Reserve Board to

elaborate and expand the legal framework governing commerce in credit").

The Seventh Circuit's decision caused widespread elation among lenders who wish to avoid disclosing the true cost of credit to consumers. Soon after it was released, AMERICAN BANKER reported that the decision represents "a victory for lenders," since banks now "do not have to make in-depth Truth-in-Lending Act disclosures to private-label credit card recipients." Jaret Seiberg, *Private-Label Accounts Require Lesser Disclosure*, AMERICAN BANKER, Jun. 17, 1998, at 4. "This opinion could not have come out any better for the industry," the article declared, quoting a lawyer who represents lenders. *Id.*

In response to the District Court decision in the Benions' case, CREDIT UNION MAGAZINE even went so far as to advocate that lenders scrap the idea of closed-end lending altogether, except in the cases of purchase-money residential real estate transactions and "truly unsecured term loans." This industry newsletter opined that "in an era of skyrocketing personal bankruptcies and constant challenges to lending decisions, the multi-feature, open-end lending plans credit unions pioneered appear to be a welcome safe harbor." Bruce Jolly, *Is Closed-End Lending Dying?*, CREDIT UNION MAGAZINE, Jan. 1998, at 28.

Similarly, THE REGULATORY COMPLIANCE WATCH boasted that the Seventh Circuit's decision gave "new flexibility" to the "less restrictive system of lending that requires fewer disclosures." *Tila Ruling Upholds Open-End Disclosures*, THE REGULATORY COMPLIANCE WATCH, June 8, 1998, at 1 (emphasis added). The Seventh Cir-

cuit's opinion, according to this industry newsletter, "put [Judge Posner's] seal of approval on prevailing practices in the private label credit card industry." *Id.* In light of the fact that the Benions' 50-year open-end credit plan for a satellite dish represents the prototypical violation that the TILA regulations were designed to prevent, the Seventh Circuit's opinion will adversely affect the lives and financial futures of millions of consumers.

Under the Seventh Circuit's opinion, an automobile dealer may now finance the purchase of a car with a private-label credit card issued for the sole purpose of financing the car, as long as the dealer offers the buyer an opportunity to add accessories or repairs to the "credit card" at a later date. A traditional closed-end automobile credit sale provides a set term (usually two to five years) that is less than the life expectancy of the car. The monthly payments are set high enough to cover the interest and amortize the loan within that period. The consumer knows the precise cost of financing, the number and amount of the monthly payments, and the total amount he or she will ultimately pay.

An open-end private label credit card, by contrast, has a fluctuating monthly payment that barely covers the interest charge for a particular month. If a consumer makes only the minimum payment each month, the loan will stretch for decades even with no additional purchases. The consumer never knows the number or amount of payments, the total finance charges, or how much he or she will ultimately pay. When the car wears out and the consumer needs a new vehicle, he or she will still owe almost the entire cost of the car and will be unable to afford to purchase another car.

The credit card industry laments the number of consumer bankruptcies, yet it is now basking in the Seventh Circuit's decision, which is certain to generate ever higher numbers of consumer bankruptcies.

A. TILA AND ITS IMPLEMENTING REGULATIONS REQUIRE COURTS TO LOOK BENEATH THE SURFACE OF CREDIT TRANSACTIONS TO DETERMINE THEIR NATURE AND PURPOSE.

The Truth in Lending Act requires extensive disclosures to be made by lenders who offer closed-end credit to consumers. Closed-end credit is typically offered to finance large, one-time purchases, like home mortgages, cars, and home improvement materials. Lenders who provide closed-end credit must disclose, among other things, the total amount of finance charges and the length of time necessary to pay the debt in full. 15 U.S.C. §1638.

Lenders who offer open-end credit, however, *need not* provide such information to consumers. 15 U.S.C. §1637. Because the required disclosures for open-end credit (like charge cards) are so much less stringent than the requirements for closed-end credit, Congress recognized long ago that unscrupulous creditors were likely to abuse open-end credit by designating large, one-time purchases as open-end credit. Creditors employing such a tactic avoid the need to disclose to buyers the total finance charges or total number of payments that the buyers are obligated to pay. Because consumers never see the total amount of money they will eventually owe in an open-end transaction, sellers avoid losing consumers to the "sticker shock" that can occur when

potential buyers realize the true cost of buying the item on credit.

A creditor has every incentive to attempt to force closed-end credit transactions into the open-end mold. *See, e.g.*, Sheldon Feldman, *The Specious Open-End Credit Plan—A Discussion of the Law Leading up to FTC v. Traditional Industries*, BUSINESS LAWYER, June, 1990, at 1989-1990 (creditors "prefer open-end credit disclosures because they fear that certain closed-end credit disclosures, such as the total dollar amount of finance charge, the total of payments, and 'total sale price' might engender consumer resistance to the sale").

In this case, the Benions made a one-time purchase of a satellite dish, an item that represented a major purchase for the Benion family. If the Benions had been provided with closed-end disclosures, they would have learned crucial information like the total number and amount of payments needed to completely pay off the dish and the total amount of money the dish would cost if they made each monthly payment until the debt was paid off. Bank One, however, documented the Benions' purchase as an open-end transaction by extending them a few dollars in "credit" that they could use to purchase accessories for their satellite dish. The Benions never learned how long it would take to pay off the loan or how much money they would ultimately pay in principal and interest. It would have been impossible for the Benions to deduce this information from Bank One's disclosures without access to an amortization table.

The less-stringent requirements for open-end credit are necessary because, in the case of legitimate open-end plans like bank credit cards, it is simply not possi-

ble to make disclosures required by closed-end plans. A big-ticket item like the Benions' satellite dish, however, is exactly the kind of purchase that TILA's closed-end disclosures were designed to regulate. As Congress stated, "[i]t is the purpose of [TILA] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." Sen. Rep. No. 72, 96th Cong., 2nd Sess., *reprinted in* 1980 U.S.C.C.A.N. 280, 287; *Milhollin*, 444 U.S. at 559.

In 1980, Congress attempted to "curb the use of spurious open-end credit" by amending its definition of open-end credit and adding the requirement that "the creditor reasonably contemplates repeated transactions." Sen. Rep. No. 96-368, 96th Cong., 2nd Sess., *reprinted in* 1980 U.S.C.C.A.N. 236, 259; 15 U.S.C. §1602(i). Rather than set forth a bright-line rule to separate open-end and closed-end transactions, Congress chose a case-by-case "reasonableness" approach by which courts must consider the totality of the circumstances surrounding each credit transaction. 1980 U.S.C.C.A.N. at 260.

The resulting Federal Reserve Board regulations ("Regulation Z"), 12 C.F.R. §226 *et seq.*, provide guidance for courts in evaluating whether transactions are properly open-end credit. Courts are to consider whether the creditor reasonably contemplates repeated transactions; whether the creditor imposes a periodic finance charge on an outstanding unpaid balance; and whether credit is made available to the extent that any outstanding balance is repaid. 12 C.F.R. §226.2(a)(20).

The accompanying Official Staff Commentary, which has the status of a regulation, *Milhollin*, 444 U.S. at 565-570, underscores the comprehensive nature of the test that courts must use to determine the true nature of a particular financing arrangement. The commentary states that "the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time extension of credit." Comments to §226.2(a)(20). The 1997 amendments to the commentary further state that "[i]nformation that much of the creditor's customer base with accounts under the plan make repeated transactions is relevant to the determination, *particularly when the plan is opened primarily for the financing of infrequently purchased products or services*." *Id.* (Emphasis added). The Seventh Circuit erred, then, in accepting the *subjective view of the creditor* as the determining factor in its analysis.

The FRB's use of terms like "reasonable" and "legitimate" confirm that it envisioned a comprehensive test that looks beneath the surface of a transaction to determine its nature and purpose. Courts are instructed to evaluate each transaction individually and make an informed decision about whether the financing plan was really designed to deceptively avoid the extensive disclosure requirements of closed-end credit.

In 1997, several attorneys general became concerned about the abuse of open-end credit under the existing regime. They asked the FRB to address the issue, and the FRB proposed several amendments to the Official Staff Commentary that would have instructed courts to consider factors such as whether the credit line is limited to the purchase of items not likely to be bought

a second time; whether the credit account itself was established for the sole purpose of purchasing a particular item; and whether a big-ticket item fills nearly all of the available credit. 62 Fed. Reg. 64,769, 64,771 (Dec. 7, 1997).[1]

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[1] The FRB's proposed amendments stated:

2(a)(20) Open-end credit.

3. Repeated transactions. Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with the consumer under the credit plan as a whole and need not believe the consumer will reuse a particular feature of the plan.

i. Factors. Each credit plan may differ, and no one factor will determine whether a creditor reasonably contemplates repeated transactions. Some of the factors to be considered in determining whether a creditor could reasonably contemplate repeated transactions are:

A. Whether the line of credit is limited to the purchase of a certain product if it is a product that consumers would not likely purchase in multiples. The greater the variety of products available for purchase under the credit line, the more likely it is that the creditor reasonably contemplates repeated transactions. Some creditors may not offer a variety of products for purchase, but given the nature of the creditor's products or services, it is nonetheless likely that consumers will make repeated purchases—as in the case of gasoline companies that issue credit cards.

B. Whether the creditor establishes a line of credit for the purpose of enabling the consumer to purchase a designated item. It is more likely that a creditor

(continued...)

[1] (...continued)

reasonably contemplates repeated transactions if a consumer may use the credit to purchase any one of a number of items. For example, if a retailer of pianos establishes a line of credit for the purpose of the consumer purchasing a piano, it is unlikely that the creditor can reasonably contemplate repeated transactions.

C. If the creditor establishes a line of credit to finance the consumer's purchase of a designated item, the amount of the transaction relative to the credit made available to the consumer. The larger the amount of the transaction, the less likely it is that the creditor reasonably contemplates repeated transactions. For example, if a retailer of satellite dishes makes credit of $5,000 available to a consumer for the purchase of a satellite dish, and the cost of the satellite dish is $ 4,500, it is not likely the creditor contemplates repeated transactions. The fact that the retailer sells other products that are nominal in amount (compared with the cost of the major purchase) is not a sufficient basis to contemplate repeated transactions.

D. The extent to which a creditor reasonably solicits customers with its line of credit to make additional purchases under the credit line. For example, if a home improvement contractor issues a private label credit card with a $ 10,000 limit to a consumer paying for roof repairs in the amount of $ 9,000, and sends monthly solicitations for aluminum siding, the creditor does not reasonably contemplate repeated transactions.

E. Whether the creditor has information on consumers with the credit line showing that consumers have made repeat purchases. The more information that shows that consumers have made repeat purchases, the more likely it is that the creditor reasonably contemplates repeated transactions.

ii. Standard. A standard based on reasonable belief by a creditor necessarily includes some margin for

(continued...)

The banking and consumer finance industry vigorously opposed these proposals, agitating instead for exactly the sort of objective, bright-line test that Congress and the FRB had flatly refused to provide. *See, e.g., Fed Adopts Regulation Z Staff Commentary Changes*, ABA BANK COMPLIANCE, May 1998, at 1. Although the amendments ultimately were not adopted by the FRB, they nevertheless shed light on the issues that the FRB considers important with respect to evaluating the nature of credit plans. The FRB stated that its failure to ultimately adopt these amendments did *not* mean that it rejected them, but merely that it "found it difficult to establish a clear rule that differentiates be-

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[1] (...continued)

> judgmental error. The fact that a particular consumer does not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with the consumer.
>
> For example:
>
> A. It would be more reasonable for a thrift institution chartered for the benefit of its members to contemplate repeated transactions with a member than for a seller of aluminum siding to make the same assumption about its customers.
>
> B. It would be more reasonable for a bank to make advances from a line of credit for the purchase of an automobile than for an automobile dealer to sell a car under an open-end plan.
>
> . . .

tween spurious and legitimate open-end credit." 63 Fed. Reg. 16,669, 16,670 (Apr. 6, 1998).

In sum, courts are to consider all the circumstances of a credit transaction that is suspected of masquerading as an open-end plan to determine whether it should have been documented as a closed-end plan. Because Congress and the FRB have pointedly avoided implementing a bright-line rule, courts must weigh each case carefully and individually.

Substance prevails over form when considering whether a creditor has violated Truth in Lending requirements. *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 156 (1981); *Edwards v. Your Credit, Inc.*, No. 97-30826, 1998 U.S. App. LEXIS 16818, *22-24 (5th Cir. July 21, 1998) (because TILA is remedial in nature, "the substance-over-form doctrine provides the proper framework for analyzing this case"). This Court applies the substance-over-form doctrine to consumer finance issues. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 366 n.26 (1973). The other courts of appeal have followed suit. *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 515 (5th Cir. 1976); *Adiel v. Chase Federal Savings & Loan Association*, 810 F.2d 1051, 1053 (11th Cir. 1987); *Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 44, 46 (8th Cir. 1977). The prevalence of substance over form in consumer finance law is identical to the principle of tax law that holds that courts must look past the labels assigned by the parties to determine the true nature of transactions. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

The Seventh Circuit abrogated its obligation to view the Benions' transaction in its true light—rather than

considering the possibility that the defendants set up an open-end account for the purchase of a satellite dish for no other purpose than to *avoid a rule of law*, the Seventh Circuit simply took the defendants at their word and concluded that they "complied with the letter of the law." App. 4.

B. THE SEVENTH CIRCUIT IMPROPERLY REJECTED THE EXISTING STATUTORY AND REGULATORY SCHEME.

The Seventh Circuit rejected the carefully-drawn statutory and regulatory regime outlined above in favor of its own brand of rulemaking. The Seventh Circuit refused to apply the test created by Congress and the FRB, preferring instead to render the closed-end disclosure requirements a dead letter by making open-end credit acceptable in almost any context, no matter what the nature of the relationship between the creditor and the consumer. The Seventh Circuit thus rendered it almost impossible for any plaintiff to successfully challenge spurious open-end credit plans under the existing legislative and regulatory scheme.

The Seventh Circuit recognized at the outset that its task was to decide "an important interpretive question under the Truth in Lending Act and one on which we have been unable to find any appellate decisions." App. 1. After examining the language of the statute and the regulatory scheme, however, the Seventh Circuit unilaterally abdicated its task, declaring that it preferred to wait for an amendment to the statute or regulations before consenting to decide a case involving these issues. Such an approach is impermissible—the fact that Con-

gress and the FRB declined to spell out a bright-line rule does not permit the Seventh Circuit to refuse to enforce statutes as written. *Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993).

The Seventh Circuit acknowledged that the Benions "invite us to consider the enormous loophole that would be created if auto dealers could finance the purchase of an automobile by issuing a credit card conditioned on the holder's using it to buy an automobile from the dealer." App. 5. However, the Seventh Circuit flatly refused to apply the existing test to these hypothetical facts (and to the Benions' transaction as well):

> But if such a method of financing big-ticket purchases would be an abuse of the open-end credit provision of the Truth in Lending Act, as we may assume it would be, it could be curbed only by changing the regulatory scheme, for example by specifying a minimum ratio of subsequent purchases to original purchase.

App. 5-6. The Seventh Circuit further speculated that "[i]f the Board cannot formulate such a rule in the exercise of its expert administrative discretion, we surely cannot formulate it as a matter of statutory interpretation." App. 6. The Seventh Circuit thus deviated greatly from its recent pronouncement in *Fitzgerald v. Chrysler Corporation*, 116 F.3d 225, 226 (7th Cir. 1997):

> When a statute is broadly worded in order to prevent loopholes from being drilled in it by ingenious lawyers, . . . courts find it helpful, in interpreting such statutes in a way that will avoid absurd applications . . . to identify the prototype situation to which the statute is addressed.

Had the Seventh Circuit followed this rule in the Benions' case, it surely would have recognized that the Benions' open-end credit account for the purchase of a satellite dish, which the Benions' expert estimated would take more than fifty years to pay off by way of the minimum monthly payments, was exactly the kind of situation contemplated by TILA's disclosure rules.

The Benions never asked the Seventh Circuit to formulate a bright-line rule—such a task is impermissible, because Congress and the Federal Reserve Board have already mandated a "reasonableness" test. The Benions only asked that the Seventh Circuit apply the "reasonableness" test as required by TILA and its implementing regulations in order to determine whether this particular transaction was, indeed, an abuse of the open-end credit option. The Seventh Circuit's opinion essentially demands that Congress and the FRB provide it with a bright-line rule—otherwise, it will continue to refuse to consider the issue of spurious open-end credit.

Despite its position that it cannot decide this case, the Seventh Circuit nevertheless did make a pronouncement about the Benions' transaction: it stated that "it is apparent from the uncontradicted evidence just recited [concerning the defendants' expectations for repeat transactions] that the defendants have complied with the letter of the law." App. 4. It concluded that the statute and regulations "do not address the case [such as this one] in which the issuer reasonably contemplates repeat purchases though fewer than it would if it were financing sales by a department store or other general retail dealer." App. 9. The Seventh Circuit cannot simultaneously refuse to decide this case based on the

comprehensive criteria provided by Congress and the FRB and, at the same time, proceed to issue an opinion terminating the case based on its view of the "letter of the law."

CONCLUSION

The Seventh Circuit's opinion invites lenders to offer spurious open-end credit with impunity. Its decision has already begun to engender a new wave of "credit cards" for one-time purchases. If left to stand, the decision will injure millions of consumers whom TILA sought to protect from such schemes. For all the reasons stated above, petitioners Harry Benion and Patricia Benion respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: August 19, 1998

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-2769

HARRY BENION and PATRICIA BENION, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

BANK ONE, DAYTON, N.A., ECHO ACCEPTANCE CORPORATION, and SUPERIOR SATELLITE, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 4178—**Ruben Castillo**, *Judge.*

ARGUED FEBRUARY 13, 1998—DECIDED MAY 21, 1998

Before POSNER, *Chief Judge*, and MANION and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* This appeal presents an important interpretive question under the Truth in Lending Act and one on which we are unable to find any appellate decisions. Mr. and Mrs. Benion bought a satellite dish from Superior Satellite, an authorized dealer in products distributed by EchoStar Communications. The price of the dish was around $3,000 and in addition the Benions paid $1,000 for a year's worth of programming transmitted by

satellite. The Benions didn't want to pay cash for these purchases, and so applied for an "EchoStar" credit card. This card is offered by Bank One in conjunction with Echo Acceptance (EchoStar's consumer financing arm). The Benions' application was accepted on the spot and they were given the card with a credit limit of $4,500, a few hundred dollars above the price of their purchases. The EchoStar card may be used at any of the hundreds of authorized retail dealers in EchoStar products. But EchoStar requires that the first use of the card include the purchase of a satellite dish, which usually costs at least $2,000, and limits subsequent purchases to goods and services that can be used in conjunction with the dish, such as a television set, video recorder, or television programming (a pay channel, for example). In the papers accompanying the sale to the Benions, the interest rate that Bank One charges on the unpaid balance of credit card debt—a variable rate that at the time of the sale and the issuance of the card to the Benions was about 19 percent—was disclosed, but not the total finance charge (roughly, the dollar amount of the interest) that the credit card holder would incur if the debt were paid off at the minimum rate permitted.

The Benions weren't happy with their purchase and refused to pay anything toward the satisfaction of their credit card debt, precipitating a legal squabble between them and Superior, Echo Acceptance, and Bank One. The squabble has mushroomed into a class action by the Benions on their own behalf and that of some 50,000 other users of the EchoStar card, claiming that the disclosures made to users concerning the cost of credit violate the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and the Illinois Consumer Fraud Act, 815 ILCS 505/1 *et seq.* The district judge granted summary judgment for the defendants on both claims. 967 F. Supp. 1031 (N.D. Ill. 1997). He held that the state fraud claim was derivative from the Truth in Lending Act and fell with it. *Id.* at 1037. The plaintiffs do not challenge the derivative status of the

fraud claim in their opening brief, and so we shall not have to consider that claim further.

The Truth in Lending Act has separate disclosure requirements for "open-end" and "closed-end" credit transactions. The requirements for the latter are more onerous (compare 15 U.S.C. § 1637 with *id.* § 1638), and include stating the total finance charge. *Id.*, § 1638(a)(3); 12 C.F.R. § 226.18(d). If the credit arrangements with the Benions are classified as closed end, the Act was violated; otherwise not.

An open-end credit plan, the category that includes legitimate credit-card credit and revolving credit more broadly, is a financing plan under which the creditor "reasonably contemplates repeated transactions." 15 U.S.C. § 1602(i). The Federal Reserve Board, which has the statutory power to make regulations particularizing the obligations of creditors under the Act, 15 U.S.C. § 1604(a); see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365-66 (1973); *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 285 (7th Cir. 1997); *Consumers Union of the U.S., Inc. v. Federal Reserve Board*, 938 F.2d 266, 269 (D.C. Cir. 1991), has in its Regulation Z merely (so far as relevant here) repeated the statutory definition of open-end credit that we just quoted. 12 C.F.R. § 226.2(a)(20)(i). The Board's Official Staff Commentary on this section of Regulation Z, 12 C.F.R. pt. 226.2(a)(20)(3), supp. I, which also has the status of a regulation, *Ford Motor Credit Co. v. Milhollin, supra*, 444 U.S. at 565-70; *McGee v. Kerr-Hickman Chrysler Plymouth, Inc.*, 93 F.3d 380, 383 (7th Cir. 1996); *Cades v. H & R Block, Inc.*, 43 F.3d 869, 875 (4th Cir. 1994), is more expansive, but adds little of substance to Regulation Z beyond a reminder that the criterion is what is reasonably contemplated rather than what actually occurs, so that the fact that a particular customer uses a credit card only once does not convert the credit plan from open end to closed end. "[T]he creditor must reasonably contem-

plate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. . . . The fact that a particular consumer does not return for further credit extensions does not prevent a plan from having been properly characterized as open-end." Nowhere does the statute, regulation, or staff commentary specify a minimum number of repeat purchases that must either be contemplated or occur.

It is beyond contestation that the bank (the only Truth in Lending defendant) hoped and expected, and *reasonably* expected, to have at least some repeat transactions with the holders of the EchoStar card. The card was usable at any dealer in a nationwide chain of dealers. Bank One had an aggressive marketing strategy designed to promote repeat purchases, which was very much in its financial self-interest. The bank had studied the performance of EchoStar's financing plan in an earlier incarnation and had obtained statistics which showed that repeat purchases had been an increasing fraction of total purchases under the plan. And, although we must not confuse hindsight with foresight, what actually happens is some evidence of what was reasonably expected to happen, and so it is relevant though not determinative to note that 20 percent of all holders of the EchoStar card issued by Bank One who used the card at least once (some never used it) made one or more additional purchases with the card after the initial purchase. The Benions bought only one year's worth of programming; it was likely that they would use the card to buy programming for the next year.

As neither the statute nor the regulation specifies a minimum level of "repeated transactions," it is apparent from the uncontradicted evidence just recited that the defendants have complied with the letter of the law. It is also apparent that a law which fixed a minimum level of repeat purchases for credit to qualify as open end would place

the "private label" (as distinct from bank) credit card business in jeopardy unless it threw in the towel and made the disclosures required for closed-end credit. For the issuer could never be sure that consumer dissatisfaction, or a switch by consumers to an alternative method of financing, wouldn't cause repeat purchases to fall below the threshold fixed by the law. The jeopardy would be particularly great for new cards. Not only couldn't consumer acceptance be assured; the level of repeat purchases would necessarily be slight at the outset, since a repeat purchase cannot be made before the first purchase. In fact the percentage of purchases with the EchoStar card that are repeat purchases has grown since the card was introduced.

The Benions complain that their credit limit was so low in relation to their initial purchase ($4,500 versus $4,300) that the defendants could not have reasonably contemplated repeat purchases by them. But since it was a *revolving* credit limit, they could make substantial repeat purchases as soon as they paid off a substantial portion of the debt they incurred in making the initial purchase.

The Benions have a better argument—that the defendants were trying to evade the Truth in Lending Act by conditioning the first use of the card on the purchase of a big-ticket item and then limiting subsequent purchases to products related to the initial purchase. They invite us to consider the enormous loophole that would be created if auto dealers could finance the purchase of an automobile by issuing a credit card conditioned on the holder's using it to buy an automobile from the dealer (or, as here, other dealers in the same product), and could justify this as open-end credit by pointing out that purchasers of automobiles buy parts and service from either the same dealer or other dealers in the same make of automobile. But if such a method of financing big-ticket purchases would be an abuse of the open-end credit provision of the Truth in Lending Act, as we may assume it would be, it could be curbed only by changing the regulatory scheme, for ex-

ample by specifying a minimum ratio of subsequent purchases to original purchase. When an activity of a technical and specialized character is comprehensively regulated by an expert agency, as consumer credit disclosures are comprehensively regulated by the Federal Reserve Board (and no one doubts that this particular agency is a repository of genuine expertise), courts should generally leave the plugging of loopholes to the agency, lest the court's reparative efforts create confusion and disrupt the regulatory scheme. Cf. *Ford Motor Co. v. Milhollin, supra,* 444 U.S. at 566-69; *Wise v. El Paso Natural Gas Co.,* 986 F.2d 929, 935 (5th Cir. 1993); *Butler County Memorial Hospital v. Heckler,* 780 F.2d 352, 355-56 (3d Cir. 1985).

As a matter of fact, shortly before the argument of the appeal in this case, the Board invited public comment on a proposed amendment to the Official Staff Commentary that would have forbidden the use of open-end credit in the present type of case. 62 Fed. Reg. 64,769, 64,772 (Dec. 9, 1997). But after receiving the public's comments, the Board, while expressing criticism of creditors' failing to disclose the finance charge in "the financing of used automobiles and the door-to-door credit sales of satellite dishes, water treatment systems, and home improvement contracts," withdrew the proposal, having determined that it would be infeasible to formulate a clear rule that would differentiate between legitimate and illegitimate open-end credit programs. 63 Fed. Reg. 16,669, 16,670 (Apr. 6, 1998). (The present case involves the sale of satellite dishes, but not their "door-to-door" sale.)

If the Board cannot formulate such a rule in the exercise of its expert administrative discretion, we surely cannot formulate it as a matter of statutory interpretation. Yet in the teeth of the language of the statute as well as in defiance of practicality, the plaintiffs argue that the Truth in Lending Act already contains a minimum ratio of repeat to original purchases—and it is 1:1. That is, repeat purchases must be at least half the total purchases made with the

credit card for the financing plan to be open end. The plaintiffs base this argument on the Senate report which accompanied the amendment to the Truth in Lending Act in 1980 that first required that the creditor have reasonably contemplated repeat sales. The report discusses "spurious open end credit," which occurs when "a merchant styles what is likely to be a one-time credit extension in the form of a purchase on an open end (revolving charge) plan;" it adds that closed-end disclosures (in particular the finance charge) should be required "where an initial transaction is the purchase of infrequently purchased items such as a home improvement or automobile." S. Rep. No. 73, 96th Cong., 2d Sess. 10-11 (1980). The Benions argue that "likely" means more than 50 percent probable, that a *probability* of more than 50 percent is equivalent to a *frequency* of more than 50 percent, and hence that the issuer of a private label credit card violates the Act unless more than 50 percent of the purchases made with the card are repeat purchases—and anyway that big-ticket items are not eligible for credit card credit.

What a series of leaps! The biggest is substituting a statement in a committee report for the language of the statute, and of the regulation and commentary of the agency that Congress entrusted with particularizing the statute. Substituting legislative history for legislation has become a disfavored method of statutory interpretation, *Shannon v. United States*, 512 U.S. 573, 583-84 (1994); *Baker v. GTE North Inc.*, 110 F.3d 28, 30-31 (7th Cir. 1997); *International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 708, 710-15 (D.C. Cir. 1987), in recognition of the fact that Congress enacts and the President signs statutes rather than committee reports. In any event the committee report on which the Benions rely cannot be taken literally, because neither "likely" nor "infrequently purchased" is an operational criterion. The committee was obviously concerned with what it called spurious credit card financing, but the chosen method of dealing with it was by general language

in a statute that delegates rulemaking authority to an agency. If the committee had proposed amending the statute to substitute the language of the committee report, there might well have been a fight on the floor of Congress because of the breadth and vagueness of that language.

The plaintiffs do not seek a trial (their lawyer made this clear at argument) at which to try to prove that it was unreasonable for the bank to expect repeat purchases. They want summary judgment. They think they've already proved their case by showing that satellite dishes are (or at least were at the time the Benions bought their dish, because the prices of the dishes have been falling rapidly since) "big ticket" items; that the issuance of the card was conditioned on its being used to buy the dish; that their credit limit was set just above the price of their initial purchase; that the most likely subsequent purchases with the card, such as television sets and programming, are generally less expensive and often much less expensive than the dish; and that creditors want to disclose as little information about credit costs as they can get away with doing. These points are of marginal relevance at best; at worst they could be thought to assume that repeat purchases were expected and to be quibbling merely over the amount of those purchases, which is consistent with the Benions' claim that 50 percent of the total purchases must be repeat purchases but with nothing else. Since EchoStar's principal product is satellite dishes, it is natural that it should want to condition the extension of credit on the purchase of a dish. This is consistent with a reasonable expectation that the holder of the card will use it to buy other things as well—the goods and services that are complements to the dish in the economic sense and so enhance its value. All the facts alleged by the plaintiffs are consistent with an expectation of repeat purchases.

There may be cases in which the issuer of the card does not reasonably contemplate any repeat purchases; an example would be a sale of aluminum siding by a company

that sells nothing else. The statute and regulation take care of that case, which in fact is specifically mentioned in the staff commentary. 12 C.F.R. pt. 226.2(a)(20)(3), supp. I. They do not address the case in which the issuer reasonably contemplates repeat purchases though fewer than it would if it were financing sales by a department store or other general retail dealer.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

App. 10

[Dated June 11, 1997]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRY BENION and PATRICIA BENION, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 95 C 4178
	)	Judge Castillo
BANK ONE, DAYTON, N.A., ECHO ACCEPTANCE CORPORATION, and SUPERIOR SATELLITE,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Harry and Patricia Benion have brought this class action suit against Bank One, Dayton, N.A., Echo Acceptance Corporation, and Superior Satellite, Inc., alleging violations of the Truth In Lending Act ("TILA") in Count I, and the Illinois Consumer Fraud Act ("ICFA") in Count II. Bank One and Echo have moved for summary judgment pursuant to Fed. R. Civ. P. 56. Superior has filed a piggyback motion for summary judgment, arguing that if summary judgment is granted in favor of Bank One and Echo, it cannot be liable either. Finally, the plaintiffs have cross-moved for summary judgment, seeking a ruling that the defendants

are liable to them as a matter of law. This opinion addresses all of the parties' motions for summary judgment.

For the reasons described below, this court reluctantly finds that the defendants are, on the undisputed facts of this case, entitled to summary judgment. Our conclusion is reluctant because consumers' use of the charge card credit plan at issue here undeniably tends to undermine their ability to appreciate fully the cost of their credit obligations, to the detriment of Congress' goal in enacting TILA—enabling consumers to shop for and use credit wisely. *See* 15 U.S.C. § 1601(a) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit"); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980) (same). A thoughtful consideration of the issues presented in this case suggests that the present test for compliance with TILA does not cope well with advances in the marketing of big-ticket consumer products by creditors and retailers. However, fine-tuning the scope of TILA is a legislative rather than a judicial function. Further legislative or administrative treatment of these issues is sorely needed. In the absence of better guidance in this area, we apply the law as it is written and find that the undisputed facts of this case entitle the defendants to judgment in their favor as a matter of law.

RELEVANT FACTS[1]

In February 1995, the Benions visited a Sam's Club store in which a salesman for Superior Satellite, a local consumer electronics retailer, was demonstrating and selling satellite television systems. Patricia Benion—like many Chicagoans, an avid sports fan—was entranced by the astounding number of sports games available with a satellite television system. On the spot, the Benions agreed to purchase a satellite television system for $4,297.52. In addition to a satellite dish, roof mount, and various free accessories, the sale included one year's worth of programming (the most expensive programming package available, so that Patricia Benion could be sure to get all her games) which cost $996.00 by itself. When Patricia Benion expressed doubt that her credit rating was good enough to enable her to make this purchase, the salesman suggested that she apply for an

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[1] The following recitation of facts is drawn from the parties' various submissions of undisputed facts in support of their motions, and from their responses to their opponents' submissions. Some of the responses to factual submissions failed to comply with Local General Rules 12(M) and (N); a prime example of this is the declaration that "the factual assertion is not material (or is vague), and therefore the party makes no response to it." Rule 12 does not permit a party responding to factual submissions to pick and choose among the submissions and only deign to respond to those judged "material" or "relevant." Rather, it is the *Court's* role to weed out irrelevant or immaterial factual submissions. The respondent's role is to respond to the assertion, citing to the record if the assertion is denied. Responses that do not conform to Rule 12's requirements are treated as admissions of the factual matter asserted. *See* Local Rule 12(M) and 12(N)(3)(b) (facts set forth in either party's statement are deemed admitted unless properly controverted); *see also Flaherty v. Gas Research Inst.*, 31 F.3d 451, 453 (7th Cir. 1994) (same).

EchoStar Revolving Charge Plan. The Benions signed the application for the charge plan without reading it. The parties disagree about what information the Benions were given about the charge plan before they signed the application. A charge account was opened for the Benions with a credit limit of $4,500.00, a few hundred dollars above the amount of their first purchases. There is no evidence of whether it is typical that the credit limits on EchoStar accounts are set just above the amount of the first purchases.

The application completed by the Benions was for the EchoStar Revolving Charge Plan ("Plan"), a private label credit card offered by Bank One, a national bank with its principal place of business in Dayton, Ohio. Bank One began issuing this credit card in 1994 through an agreement with Echo Acceptance Corporation, a consumer finance company specializing in arranging credit for the sales of equipment and programming related to satellite television systems. Once an account under the Plan is opened for a consumer, the consumer is issued a plastic credit card that may be used to make purchases at any Echo authorized dealer, of which there are several hundred throughout the country, or to order products or television programming directly from Echo or programming packagers. Authorized dealers sell satellite dishes, receivers, accessories, and programming distributed by EchoStar Communications Corporation, and also typically stock other consumer electronics products including televisions, VCRs, and stereo equipment. Superior Satellite is one such authorized dealer. According to instructions issued to Echo dealers, a satellite receiver must be included in the first purchase a consumer makes using the new

credit card. The initial purchase of a satellite receiver, related equipment, and installation generally totals between $2,000.00 and $4,000.00, although a low-cost satellite dish standing alone can cost as little as $199.00.

The EchoStar Revolving Charge Plan is set up much as any other credit card account. A consumer may make purchases using the card up to the credit limit set for the account. Paying part or all of the outstanding balance on the account replenishes the available credit to the extent of the payment. Bank One periodically imposes a finance charge on outstanding balances. Consumers receive monthly statements listing the outstanding balance, the minimum payment due on that balance, and the amount of remaining available credit. When enrolling in the Plan, consumers are supposed to receive all disclosures required by TILA for open-end credit plans, although the plaintiffs state that they did not receive such disclosures when they signed up for the EchoStar plan.

The central issue in all of the pending motions for summary judgment is whether, in deciding to structure the EchoStar plan as a credit card plan, Bank One reasonably expected that consumers would continue to make purchases using the EchoStar card over time. Many of the parties' factual submissions relate to this issue. Fairly summarized, the submissions show that Bank One viewed repeat sales as a goal of the Plan, and genuinely believed that the credit card would encourage repeat sales to a relatively captive consumer base. Bank One planned to encourage such sales through advertising enclosed with the monthly account statements, as well as through other promotions.

Before entering into the agreement with Echo to create the Plan, Bank One reviewed sales data from a similar private label credit card plan that another company, Household Retail Services, had operated in conjunction with Echo. In 1993, there were 30,420 first-time purchases made under the Household plan, and 4,260 repeat purchases through the plan. Thus, 12.3% of all purchases made using the Household plan in 1993 were repeat purchases. The plaintiffs point out that these repeat sales only amounted to 2.3% of the income from purchases under the plan. For the first five months of 1994, repeat purchases were 17% of all Household plan purchases; these repeat purchases accounted for 3.8% of the dollar amount produced by sales under the plan. The above figures do not reflect accounts opened under the plan that were never used for any purchases.

After the inception of the Bank One/EchoStar Revolving Charge Account plan in November 1994, Bank One included advertisements for Echo products and programming packages in its monthly statements to consumers. In its instructions to Echo dealers, Bank One also encouraged the dealers to promote the availability of the credit card for future purchases. Whether as a result of these promotions or for some other reason, consumers have made some additional purchases using their EchoStar credit cards. In April, 1995, repeat sales were 6.97% of all sales under the Plan. One year later, repeat sales accounted for 11.40% of the sales under the Plan. (In June and July of 1996 repeat sales accounted for half of all Plan sales, but the plaintiffs argue that these months are not representative.) By August, 1996, 51,476 accounts had been opened under the Plan. Just under

60% of the accounts had been used to finance a purchase; a little over 40% had never been used. Of the 30,673 accounts that had been used for at least one purchase, 6,356 had also been used for an additional purchase. Thus, 12.3% of all accounts (active and inactive), or 20.7% of the active accounts, had been used for repeat purchases. A random sample of 75 repeat purchases made between March 1995 and May 1996 shows that 29% of the repeat purchases were for programming packages. Repairs or parts accounted for almost one quarter of the "add-on" sales. Another 25% was for satellite-related equipment such as additional receivers, remote controls, or surge protectors. The remaining purchases were stereo or sound equipment, televisions, VCRs, extended warranties, and programming guides.

LEGAL STANDARDS

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue for trial exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The court must view all evidence in the light most favorable to the nonmoving party, *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659 (7th Cir. 1987), and draw all inferences in the nonmovant's favor. *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990). In making its decision, the court's sole function is to determine whether sufficient evidence exists to support a verdict

in the non-movant's favor. *Anderson*, 477 U.S. at 255. Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge when deciding a motion for summary judgment. *Id.*

Where, as here, cross-motions for summary judgment have been submitted, the court is not obliged to grant judgment as a matter of law for one side or the other. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993). The court must evaluate each party's motion on its own merits, resolving all factual uncertainties and drawing all reasonable inferences against the party whose motion is under consideration. *Id.*; *Buttitta v. City of Chicago*, 803 F. Supp. 213, 217 (N.D. Ill. 1992), *aff'd*, 9 F.3d 1198 (7th Cir. 1993).

ANALYSIS

Count I – TILA Claim

TILA sets out two different types of credit that may be extended to consumers: open-end credit (the prototypical example is a credit card account), and closed-end credit, such as a car loan or other retail installment contract. Those who extend credit to consumers are responsible under TILA for knowing the difference between the two and making the appropriate mandatory disclosures to consumers. The regulation applicable to TILA (known as Regulation Z) requires that closed-end disclosures be made unless the credit at issue qualifies as an open-end plan. *See* Regulation Z, 12 C.F.R. § 226.5-17. Among other things, closed-end disclosures must include the total amount financed, including both the sale price and the total amount of interest that will be paid, the length

of time over which payments may be made, the amount of each installment payment and the intervals between payments, and the amount of any finance charges. These disclosures must be made at the point of sale.

The disclosures required for open-end accounts are somewhat less onerous. They may be contained in a pre-printed form given to consumers before the account is opened, telling them (among other things) the annual percentage rate of interest charged on the account, and the nature and amount of any finance charges. Creditors have considerable incentive to structure credit in an open-end form if they can, both because the disclosures are less burdensome to provide, and because "they fear that certain closed-end credit disclosures, such as the total dollar amount of finance charge, the total of payments, and 'total sale price' might engender consumer resistance to the sale." Sheldon Feldman, "The Specious Open-End Credit Plan—A Discussion of the Law Leading up to *FTC v. Traditional Industries*," 45 Bus. Law. 1989, 1991 (June 1990). However, creditors may only treat a credit plan as open-end if it qualifies as such under TILA regulations. The plaintiffs contend that TILA required that the EchoStar Plan be structured as a closed-end credit plan, and that Bank One and Echo violated TILA by failing to provide them with closed-end disclosures.

The regulations define "open-end credit" as having the following three characteristics:

> (i) The creditor reasonably contemplates repeated transactions;
> (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and

> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

12 C.F.R. § 226.2(a)(20). Closed-end credit is defined as any consumer credit other than open-end credit. *Id.*, § 226.2(a)(10). The parties agree that the EchoStar Plan had the latter two characteristics of open-end credit. The dispute is over the first requirement—whether Bank One and Echo "reasonably contemplated" that consumers would make repeated purchases under the Plan.

The only guidance to the intended meaning of "reasonably contemplate" is contained in the Official Staff Commentary to Regulation Z, located at 12 C.F.R. Part 226, Supplement I:

> . . . Reasonably contemplate repeated transactions . . . means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with the consumer under the credit plan as a whole, and need not believe the consumer will reuse a particular feature of the plan. A standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that a particular consumer does not return for further credit extensions does not prevent a plan from having been properly characterized as open-end.

Id., § 2(a)(20).3. The Commentary goes on to provide the following examples: (1) a thrift institution chartered for

the benefit of its members could more reasonably expect repeat credit extensions than a seller of aluminum siding; and (2) a bank could reasonably make a loan for a consumer to purchase a car under a line of credit, whereas a car dealer could not reasonably sell a car under an open-end plan (because it is much less likely that the car dealer will have frequent regular repeat business from the same car buyer). *Id.*

Although the Commentary uses big-ticket items such as a home improvement or a car as examples of appropriate subjects for closed-end credit, the overall focus of the regulations is clearly on the likelihood of repeated purchases, not on the amount financed. Aluminum siding, which often carries a "lifetime guarantee," is unlikely to be purchased again and again by the same consumer. Likewise, the average American often goes years between purchasing cars. It is not merely that these items are expensive, but that they usually involve a "one-time credit extension" that makes them appropriate for closed-end financing.

In considering whether repeated transactions are likely, we are to consider the nature of the creditor's business and the relationship between the creditor and the consumer. *Id.* Here, the relevant "business" is that of the Echo-approved retailers, which provide the only places that an EchoStar credit card may be used. These retailers sell a variety of consumer electronics; although the product line that is most important for the Plan's purposes is satellite-related products and programming, the retailers generally sell other popular audiovideo equipment including televisions, VCRs, and stereo equipment. Echo and its dealers also sell satellite television programming, another product that must be

bought or renewed at regular intervals. Because these dealers carry a wide array of products that are appealing to consumers, as well as television programming that regularly expires and must be renewed, we find that the nature of the business supports the hypothesis that repeat sales are likely. The relationship between the creditor/retailers and the consumer also makes repeat sales likely: although it is certainly possible that a consumer who buys something at an Echo-approved dealer will never enter those doors again, it is not unreasonable to suppose that a consumer visits a particular retailer because it is conveniently located, has good products or prices, or for some other reason that would remain equally valid over time. The number and accessibility of Echo-approved dealers—over 750 dealers across the country—also affects the likelihood of future purchases under the Plan, since consumers who relocate may still be able to use the Plan credit card to make purchases.

The Household Retail sales data also support Bank One's judgment that repeat credit sales were sufficiently likely to warrant adopting an open-end plan. The data showed repeat sales of between 12 and 17 percent of total sales.[2] While these figures are not overwhelming evidence that repeat sales were likely under Bank One's similar Plan, they do not make it unreasonable as a matter of law to structure the Plan as open-end rather than closed-end credit. This conclusion is buttressed by

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[2] It is true that these repeat sales accounted for less than 5% of the total revenue from sales under the Household plan. However, there is no requirement in TILA or Regulation Z that the repeat sales amount to a certain threshold percentage of the creditor's/retailer's income.

Regulation Z's requirement that creditors be given some leeway for judgmental error in predicting the likelihood of repeated transactions.

Finally, although this factor standing alone would not be persuasive, Bank One was not unreasonable in taking its own plans to aggressively encourage repeat purchases into account in deciding whether repeat sales were likely. Bank One set up marketing plans, including the use of inserts in its monthly statements to EchoStar credit card holders, that appear to have been genuinely calculated to produce future purchases. The results since the EchoStar Plan was initiated demonstrate that repeat sales in fact occur: over 20% of the Plan's active accounts have been used for repeat purchases.

The plaintiffs do not argue with these facts, although they do dispute the weight to be assigned them. The plaintiffs' central contention is that the Plan is falsely set up as an open-end plan when it should really be a closed-end plan because it involves the purchase of big-ticket goods.[3] Indeed, the instructions to retailers require that a satellite television system—an item that typically costs between $2,000.00 and $4,000.00—be among the first purchases made upon opening an EchoStar credit account. The plaintiffs are correct in suggesting that frequent repeat sales of satellite television systems themselves are unlikely, as consumers are not likely to want more than one of these. And, in many ways the use of a credit card to purchase items costing several thousand dollars undermines the goals of TILA

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[3] Ben Manley, the head of the private label credit division at Bank One, described satellite television systems as "big-ticket" items in his deposition. Manley dep. at 88.

because it makes it easier for consumers to finance large purchases on credit without truly realizing the costs associated with that credit.

Nevertheless, it is clear that under the law as it is presently written, the legitimate expectation of repeat sales, and not the probability that consumers may plunge deeply into debt without realizing the finance charges they will pay, is the test for whether credit should be considered open-end or closed-end. Although the requirement that the EchoStar credit card must be first used to make a large, one-time purchase is an unusual feature for a credit card account, we cannot see that it removes the account from the category of open-end credit plans or otherwise violates TILA.

In holding that the defendants are entitled to summary judgment on the TILA claim, we are aware of the language in the Official Staff Commentary to Regulation Z stating that the determination of whether a creditor "reasonably contemplated" repeated transactions is a question of fact. 12 C.F.R. Pt. 226, Supp. I, § 2(a)(20).3. Here, however, none of the relevant facts are disputed; rather, the parties dispute the correct interpretation of those facts under the law of TILA. The task of interpretation is, of course, a question of law that is within the province of the court. The court is likewise aware of other case law denying defendants' motions for summary judgment on similar claims, some of which contain excellent analyses of the law in this area. *See, e.g., Perry v. Household Retail Services, Inc.*, 953 F. Supp. 1370 (M.D. Ala. 1996); *Maes v. Motivation for Tomorrow, Inc.*, 356 F. Supp. 47 (N.D. Cal. 1973). Those cases are distinguishable, however, as the evidentiary records there were far less developed than in the present case.

It is that evidentiary record, which is almost entirely undisputed, that leads to our decision that a reasonable trier of fact could not conclude that the defendants committed a TILA violation. We therefore grant summary judgment in the defendants' favor on the plaintiffs' TILA claim.

Count II – ICFA

The entry of summary judgment on Count I mandates that Count II suffer a similar fate, as the plaintiffs' claim in Count II rests on the TILA violation alleged in Count I. *See* Pls.' Mot. for Partial Summ. Jmt. at 7 ("The same conduct that constitutes a violation of TILA also violates the Illinois Retail Installment Sales Act . . . [and as] a result, Bank One was precluded from collecting any finance, delinquency, collection or refinance charges"; its attempt to collect such charges from the plaintiffs constitutes the alleged ICFA violation).

CONCLUSION

For the foregoing reasons, the motions of defendants Bank One and Echo [71-1] and Superior [77-1] for summary judgment in their favor is granted, and the plaintiffs' motion for partial summary judgment [66-1] is denied. The clerk is directed to enter judgment in favor of the defendants and against the plaintiffs.

ENTER:

/s/ Ruben Castillo
United States District Judge

June 11, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Harry Benion and Patricia Benion, Plaintiffs

vs. Case Number: 95 C 4178

Bank One, Dayton, N.A., Echo Acceptance Corporation, and Superior Satellite, Defendants.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is entered in favor of the defendants Bank One, Dayton, N.A., Echo Acceptance Corporation, and Superior Satellite and against plaintiffs Harry Benion and Patricia Benion.

This cause of action is dismissed in its entirety. There being no just reason for delay, this is a final and appealable order.

Date June 11, 1997

Michael W. Dobbins
Clerk

/s/ Ruth O'Shea
(By) Deputy Clerk

[Filed July 19, 1995]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

HARRY BENION and PATRICIA BENION, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 95 C 4178
BANK ONE, DAYTON, N.A.; ECHO ACCEPTANCE CORPORATION; SUPERIOR SATELLITE, INC.;	)	
Defendants.	)	

COMPLAINT—CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. This action is brought to secure redress against the defendants' practice of improperly using open-end credit agreements to document one-time extensions of credit. Count I alleges violations of the Truth In Lending Act. Count II alleges that the same conduct violated the Illinois Consumer Fraud Act. Count III is an individual claim for breach of warranty.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action under 15 U.S.C. §1640 and 28 U.S.C. §1331.

Venue in this District is proper, in that the defendant is located here.

PARTIES

3. Plaintiffs Harry Benion and Patricia Benion ("Mr. and Mrs. Benion") are individuals who reside at 215 C Dodge Avenue, Evanston, IL 60202-3669.

4. Defendant Bank One, Dayton, N.A. ("Bank One") is a national bank with its principal place of business located at 40 N. Main Street, Dayton, Ohio 45401.

5. Defendant Echo Acceptance Corporation ("Echo") is a Colorado corporation with its principal offices located at 90 Inverness Circle East, Englewood, Colorado 80124. Its president is James DeFranco, 90 Inverness Circle East, Englewood, Colorado 80124.

6. Defendant Superior Satellite, Inc. ("Superior"), is an Illinois corporation incorporated on February 1, 1995. Its registered agent and office are Tina Weber, 915 Candota, Mt. Prospect, IL 60056.

7. Bank One is a creditor within the meaning of the Truth in Lending Act, 15 U.S.C. §1601 et seq. ("TILA") and Federal Reserve Board Regulation Z, 12 C.F.R. part 226. Bank One has entered into an "EchoStar Revolving Charge Plan," as described below, with consumers, on more than 25 occasions during each of the years 1994 and 1995.

FACTS RELATING TO PLAINTIFFS

8. On February 17, 1995, Mr. and Mrs. Benion purchased a satellite dish antenna for home use from Su-

perior, for $4,297.52. Superior had an advertising display at the Sam's Warehouse Club at 2450 Main Street, Evanston IL 60202, which Mr. and Mrs. Benion saw. Upon purchasing the antenna, Mr. and Mrs. Benion received only the document attached as Exhibit A.

9. Superior undertook to arrange financing for the purchase.

10. Superior arranged financing by arranging for the opening of an "EchoStar Revolving Charge Plan." A copy of the Revolving Credit Plan Agreement relating to this account, which Mr. and Mrs. Benion received after the purchase of the satellite dish, is attached as Exhibit B.

11. The creditor under the "EchoStar Revolving Charge Plan" is Bank One. However, the account was arranged through Echo.

12. The credit limit on the revolving charge account was $4,500. Of this amount, $4,297.52 was used to pay for the purchase of the satellite dish and related equipment and a year's worth of programming from Superior.

13. Plaintiffs never sought or requested a revolving charge account from Bank One and had no intention of using such an account for making future purchases.

14. The "EchoStar Revolving Charge Plan" is not usable at any businesses other than satellite antenna dealers.

15. The satellite antenna was installed on or about February 21, 1995, by Superior.

16. Superior installed the antenna in an improper and dangerous manner, in that:

a. Superior appropriated the wiring that Cablevision of Chicago had used to install its cable system in the Benion home. As a result, the cable system no longer worked.

b. Superior used defective connectors and wiring.

c. Superior damaged the Benion home while drilling holes for the wiring.

d. Superior failed to properly ground its system.

e. Use of the system damaged a television set to which it was connected.

17. Superior was unable to properly install the system despite several attempts, after which it refused to make further efforts to make the system function. Subsequently, Cablevision of Chicago disconnected Superior's system from its wiring.

18. When Mrs. Benion called Bank One to complain about the satellite dish, she was referred to Echo, which refused to take action.

COUNT I — TRUTH IN LENDING ACT

19. Plaintiffs incorporate ¶¶ 1-18

20. Bank One had no reason to believe that plaintiffs and the class members would make repetitive use of their "EchoStar Revolving Charge Plans," or use them for any purpose other than to make a single purchase of satellite equipment.

21. It was accordingly improper for Bank One to document the transaction as an open-end credit transaction. Instead, Bank One should have documented the

transaction as a closed-end credit transaction and made closed-end credit disclosures.

22. As a result of documenting the transaction as an open-end credit transaction instead of a closed-end credit transaction, Bank One avoided providing plaintiffs and the class members with significant disclosures required in the case of closed-end credit transactions by 12 C.F.R. §226.18. Specifically, they did not receive the following information required to be disclosed under §226.18:

> * * * **(b) Amount financed.** The amount financed, using that term, and a brief description such as the amount of credit provided to you or on your behalf.
>
> . . . .
>
> **(c) Itemization of amount financed.** (1) A separate written itemization of the amount financed, including:
>
> (i) The amount of any proceeds distributed directly to the consumer.
>
> (ii) The amount credited to the consumer's account with the creditor.
>
> (iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons.
>
> (iv) The prepaid finance charge. . . .
>
> **(d) Finance charge.** The finance charge, using that term, and a brief description such as "the dollar amount the credit will cost you." . . .
>
> **(g) Payment schedule.** The number, amounts, and timing of payments scheduled to repay the obligation. . . .
>
> **(h) Total of payments.** The total of payments,

using that term, and a descriptive explanation such as "the amount you will have paid when you have made all scheduled payments." . . .

(j) Total sale price. In a credit sale, the total sale price, using that term, and a descriptive explanation (including the amount of any downpayment) such as "the total price of your purchase on credit, including your downpayment of $ ----." The total sale price is the sum of the cash price, the items described in paragraph (b)(2), and the finance charge disclosed under paragraph (d) of this section.

POLICIES AND PRACTICES COMPLAINED OF

23. It was and is the policy of Bank One to document as open-end credit transactions one-time purchases of satellite television equipment. In the absence of a reasonable expectation of repetitive use of the revolving credit instrument, Bank One was obligated to document the transactions as closed-end credit transactions and give the more comprehensive credit disclosures required for such transactions.

24. As a result of this policy and practice of Bank One, 12 C.F.R. §226.18 was violated with respect to numerous consumer credit transactions.

CLASS ALLEGATIONS

25. This claim is brought on behalf of a class. The class consists of all persons who satisfy the following criteria:

a. They are natural persons.

b. They purchased satellite television equipment.

c. The equipment was installed at a residence, as opposed to a business establishment, according to defendants' files.

d. They received an "EchoStar Revolving Charge Plan" from Bank One.

e. They made no purchases under the "EchoStar Revolving Charge Plan" besides the initial purchase of satellite television equipment.

f. The credit limit of the "EchoStar Revolving Charge Plan" was the purchase price of the satellite television equipment, rounded up to the next increment in which Bank One issued credit limits.

26. The class period is one year prior to the filing of this complaint.

27. The class is so numerous that joinder of all members is impractical.

28. There are questions of law and fact common to the class, which questions predominate over any questions affecting only individual members. The principal issues raised by this claim are:

a. Whether Bank One engaged in a policy and practice of improperly documenting as open-end credit transactions credit sales in which there was no reasonable expectation of repetitive use of a revolving credit instrument.

b. Whether such practice violated TILA.

c. The appropriate amount of statutory damages and other relief.

29. The only individual questions concern the identification of the persons who received the improper disclosures. This can be determined by ministerial examination of papers.

30. Plaintiff's claims are typical of those of the class members. All are based on the same remedial and legal theories.

31. Plaintiff will fairly and adequately protect the interests of the class. She has retained counsel experienced in handling class actions and actions involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

32. Certification of a class under Rule 23(b)(3) is appropriate, in that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. The interest of the class members in individually controlling the prosecution and defense of separate actions is minimal, in that the class members are unlikely to be aware that their rights were violated and in that individual actions are uneconomical. Difficulties likely to be encountered in managing this class action are substantially less than are involved in other types of cases routinely certified as class actions, e.g., for securities fraud.

WHEREFORE, plaintiffs request, pursuant to 15 U.S.C. §1640, that the Court enter judgment in favor of plaintiffs and the class members and against Bank One as follows:

a. For statutory damages as provided in 15 U.S.C. §1640.

b. For attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT II — CONSUMER FRAUD ACT

33. Plaintiffs incorporate ¶¶ 1-18.

34. Bank One, Echo and Superior conspired to commit and committed the following acts:

a. Use the "EchoStar Revolving Charge Plan" to finance and document one-time credit sales of satellite television equipment.

b. Improperly document as open-end credit transactions one-time purchases of satellite television equipment.

c. Withhold and conceal from consumers material information required to be disclosed in the case of one-time credit sales of satellite television equipment, including the amount financed, the itemization of the amount financed, the finance charge, the payment schedule, the total of payments, and the total sale price.

35. Bank One, Echo and Superior thereby engaged in unfair and deceptive acts and practices, in violation of 815 ILCS 505/2 and possibly other state statutes prohibiting unfair and deceptive acts and practices in consumer transactions.

36. Bank One, Echo and Superior acted intentionally, for the purpose of concealing material information about the cost of credit from plaintiffs and the members of the class.

37. Plaintiffs and the members of the class defined below were injured by such acts and practices.

CLASS ALLEGATIONS

38. This claim is brought on behalf of a class. The class consists of all persons who satisfy the following criteria:

a. They are natural persons.

b. They purchased satellite television equipment.

c. The equipment was installed at a residence, as opposed to a business establishment, according to defendants' files.

d. They received an "EchoStar Revolving Charge Plan" from Bank One.

e. Echo was involved in arranging the "EchoStar Revolving Charge Plan."

f. They made no purchases under the "EchoStar Revolving Charge Plan" besides the initial purchase of satellite television equipment.

g. The credit limit of the "EchoStar Revolving Charge Plan" was the purchase price of the satellite television equipment, rounded up to the next increment in which Bank One issued credit limits.

39. The class period is three years prior to the filing of this complaint.

40. The class is so numerous that joinder of all members is impractical.

41. There are questions of law and fact common to the class, which questions predominate over any ques-

tions affecting only individual members. The principal issues raised by this claim are:

a. Whether Bank One engaged in a policy and practice of improperly documenting as open-end credit transactions credit sales in which there was no reasonable expectation of repetitive use of a revolving credit instrument.

b. The appropriate amount of damages and other relief.

42. The only individual questions concern the identification of the persons who received the improper disclosures. This can be determined by ministerial examination of papers.

43. Plaintiffs' claims are typical of those of the class members. All are based on the same remedial and legal theories.

44. Plaintiffs will fairly and adequately protect the interests of the class. They have retained counsel experienced in handling class actions and actions involving unlawful business practices. Neither plaintiffs nor plaintiffs' counsel have any interests which might cause them not to vigorously pursue this action.

45. Certification of a class under Rule 23(b)(3) is appropriate, in that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. The interest of the class members in individually controlling the prosecution and defense of separate actions is minimal, in that the class members are unlikely to be aware that their rights were violated and in that individual actions are uneconomical. Difficulties likely to be encountered in managing this class

action are substantially less than are involved in other types of cases routinely certified as class actions, e.g., for securities fraud.

WHEREFORE, plaintiff requests, pursuant to 15 U.S.C. §1640, that the Court enter judgment in favor of plaintiff and the class members and against defendants as follows:

a. For compensatory and punitive damages.

b. For attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT III — BREACH OF WARRANTY — MAGNUSON MOSS ACT

46. Plaintiffs incorporate ¶¶ 1-18. This claim is asserted against Superior and Bank One.

47. Superior is a "supplier" as defined in the Magnuson Moss Consumer Warranty Act, 15 U.S.C. §2301 et seq. ("MMCWA").

48. The satellite dish antenna sold to plaintiffs is a consumer product as defined in the MMCWA.

49. Superior breached implied warranties of merchantability and fitness for particular purpose.

50. Bank One is liable for such breaches under 15 U.S.C. §1666i.

WHEREFORE, plaintiffs request that the Court grant them the following relief against Superior and Bank One:

a. Appropriate damages.

b. Cancellation of their outstanding obligations.

c. Attorney's fees, litigation expenses and costs.

d. Such other or further relief as the Court deems appropriate.

Respectfully submitted,

/s/_____
Daniel A. Edelman

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JURY DEMAND

Plaintiffs demand trial by jury.

/s/_____
Daniel A. Edelman

[Exhibits A and B omitted in printing.]